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Direct Broadcast Satellites: FCC Adopts "Open Skies" Policy For Space Age Technology

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I
Introduction

Advances in telecommunications techniques have proceeded at a remarkable rate during the last several generations. While satellites have been increasingly employed to broadcast programming to radio and television stations and cable television systems,[1] the technology now exists to transmit satellite programming directly to individual consumers through the congruence of powerful satellites and small receiving antennae located at each home.[2] This new telecommunications technology is known as the direct broadcast satellite or DBS.[3] The development and authorization of DBS on a national scale poses some unique problems for the Federal Communications Commission [hereinafter FCC or Commission].

DBS offers numerous potential advantages. It can provide more television channels to subscribers and thereby, greater programming diversity. It can provide remote areas currently

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1. For a thorough discussion of satellite broadcasting in general, including the current uses of communications satellites, see A. BELENDIUK & S. ROBB, BROADCASTING VIA SATELLITE: LEGAL AND BUSINESS CONSIDERATIONS (1979).

2. It was less than 40 years ago that science fiction writer Arthur C. Clarke dreamed of a worldwide system of communications satellites broadcasting radio programming to a global audience. Clarke, *Extra-Terrestrial Relays - Can Rocket Stations Give World-Wide Radio Coverage?*, WIRELESS WORLD, Oct. 1945, at 305.

3. Direct broadcast satellite service is defined as "A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public." 47 Fed. Reg. 31574 (1982) (to be codified at 47 C.F.R. § 100.3).

See also B. SIGNITZER, REGULATION OF DIRECT BROADCASTING FROM SATELLITES 7 (1976). "Direct broadcasting from satellites (DBS) implies the elimination of earth stations and rebroadcast transmitters and the reception of the satellite signal on individual receiving sets."

receiving poor reception with more adequate television service. In addition, DBS eliminates some problems inherent in long distance microwave transmission in that it dispenses with the need for elaborate terrestrial interconnection systems.[4] Long distance microwave transmissions can be obstructed by any solid object, including the curvature of the earth, and therefore require a system of terrestrial relay stations. As distance from the transmission source increases, reception quality diminishes and transmission costs increase. DBS, on the other hand, is virtually distance insensitive.[5] This means that the satellite signal may be received anywhere within the "footprint"[6] of the satellite at essentially the same cost.[7] In short, the opportunities for increased programming diversity, increased reception quality and decreased transmission costs make DBS an attractive new telecommunications technology.

The FCC has begun the process of promulgating *permanent* regulations for the DBS industry by soliciting public comment on desirable regulatory policies.[8] The FCC's inquiry is devoted to ensuring the development of regulatory policies that are in the public interest. The Commission has determined that this entails the pursuit of three goals:

> (1) Efficient use of the spectrum (including the balance between DBS and other services), (2) Opening new channels to

4. *See The Development of Video Technology*, 25 N.Y.L. SCH. L. REV. 789, 806-807 (1980).

5. *See* A. BELENDINK & S. ROBB, *supra* note 1, at 20: "The cost of a satellite circuit is fundamentally independent of route length; the cost of connecting two terminals one mile apart is the same as when they are 2,000 miles apart or separated by an ocean."

6. "The portion of the earth covered by the transmitting antenna is called a 'footprint.'" *The Development of Video Technology*, *supra* note 4, at 801 n.168.

Note that all broadcasting satellites in use today are positioned in the geo-stationary orbit approximately 22,300 miles above the earth's equator traveling in a circumference of 165,000 miles. At this position the rate of the earth's rotation is almost identical to the rate of the satellite's rotation and thus the footprint of each satellite remains stable. The footprint of each satellite is approximately one-third of the earth's surface. *See* Perle, *Is the Bird Pie in the Sky?—Communications Satellites and the Law*, 27 COPYRIGHT SOC'Y BULL. 325 (1980).

The direct broadcast satellite is capable of providing "spot beam" coverage to a geographic area as small as 200 by 400 miles. Most proposals to provide DBS service, however, contemplate coverage of a single time zone. *The Development of Video Technology*, *supra* note 4, at 810. *See also* note 64, *infra*.

7. *See The Development of Video Technology*, *supra* note 4, at 806-807. The authors determine that "DBS's resulting cost-effectiveness could make it a viable competitor of the present television networks and pay programming systems."

8. Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 45 Fed. Reg. 72,719 (1980).

allow an opportunity for diversity of voices in order to further the goals of the First Amendment, and (3) satisfaction of consumers' preferences for programming.[9]

Permanent regulations for DBS cannot be drafted until permanent orbital and frequency allocations are established at the Western Hemisphere Regional Administrative Radio Conference in 1983 [hereinafter referred to as RARC-83].[10] RARC-83 will allot frequencies and orbital slots among the Region 2 nations (the nations of North, Central and South America)[11] and may impose certain technical parameters to prevent interference among satellite broadcasts.[12]

It is within this context that the FCC has issued *interim* regulatory policies for DBS and has begun authorizing the development of DBS systems.[13] As a preliminary step in the rulemaking procedure the FCC has determined that DBS is in the overall public interest and that the public interest will best be served by as rapid a deployment of DBS as possible.[14] The rulemaking indicates that the FCC wishes to foster free compe-

9. *Id.* at 72,719.

10. *See generally* Rice, *Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options*, 25 N.Y.L. SCH. L. REV. 813 (1980).

11. "The practice of the ITU (International Telecommunications Union) is to allocate radio frequencies on a "regional" basis. For this purpose, the globe is divided into three principal Regions, . . . Region 2 being North, Central and South America. . . . Although allocations are approved by the full ITU membership participating in an appropriate Radio Conference, each Region has a substantial influence over its own allocations." Stowe, *Implications of the 1979 WARC for 12 GHz Satellite Services in Region 2*, PROCEEDINGS OF THE TWENTY-THIRD COLLOQUIUM ON THE LAW OF OUTER SPACE 93 (1979).

12. The main role of the ITU in this area, for purposes of this note, is to prevent interference among satellite transmissions. The ITU is also involved with international issues that involve the application of technical parameters. These include the right of nations to protection from unwanted DBS transmissions, where the trend is decidedly toward prior consent, and the issue of whether spectrum space should be allocated on an a priori rather than a first-come-first-served basis, where the trend is toward a priori allocation. *See* Rice, *Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options*, *supra* note 10, at 813-821. This note is an examination of the domestic policy issues surrounding DBS and as such will not address these international issues.

13. Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 47 Fed. Reg. 31,555 (1982) [hereinafter cited as Interim Order].

Inquiry Into the Development of Regulatory Policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, 86 F.C.C.2d 719 (1981) [hereinafter cited as Interim Notice] (also printed as Inquiry into the Development of Regulatory Police in Regard to Interim Direct Broadcast Satellite Service, 46 Fed. Reg. 30,124 (1981)).

14. Interim Order, 47 Fed. Reg. at 31,558.

tition and experimentation in this new telecommunications technology. To that end the FCC has shown a willingness to authorize essentially uninhibited development of DBS systems.[15]

This note provides an explanation and analysis of the FCC's domestic interim policy decisions relating to the implementation of DBS. The note will examine the Commission's authority to act, the nature of its public interest determinations, the Commission's analysis of the impact of DBS on local broadcasters and the resultant regulatory scheme for DBS.

II
FCC's Authority to Promulgate Interim Policies

The FCC has a broad statutory responsibility to "study new uses for radio, provide for experimental uses of frequencies and generally encourage the larger and more effective uses of radio in the public interest. . . ."[16] The Commission has broad discretion in carrying out the statutory responsibilities granted it by Congress. This grant of broad regulatory discretion reflects a recognition by Congress of the complexity of the communications industry.[17] The FCC has general rulemaking authority under sections 154(i)[18] and 303(r)[19] of the Communications Act of 1934[20] to regulate in a manner "not inconsistent with the Act or law."[21] These sections provide statutory authority for the FCC to issue regulations setting forth its interpretation of what constitutes "the public interest."

The FCC has primary authority to decide whether to act through rulemaking or through individual, ad hoc proceedings. The choice lies primarily "in the informed discretion of the ad-

15. See notes 37 to 45 and accompanying text, *infra*.

16. 47 U.S.C. § 303(g) (1976).

17. *See* United States v. Storer Broadcasting, 351 U.S. 192, 203 (1956): "The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions. . . ."

18. 47 U.S.C. § 154(i) (1976) provides that "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act] as may be necessary in the execution of its functions."

19. 47 U.S.C. § 303(r) (1976) provides that the Commission shall "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]."

20. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976) (as amended).

21. United States v. Storer Broadcasting, 351 U.S. 192, 203 (1956).

ministrative agency."[22] An administrative agency may wish to act through ad hoc proceedings when it is confronted by a situation involving unforeseeable problems, when a general rule would have only marginal utility due to the varying nature of the problem or when the agency lacks "sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule."[23]

Within this context of broad regulatory discretion, the FCC promulgated interim policies for direct broadcast satellites. Using its broad statutory authority, the FCC adopted what may be considered a hybrid form of interim regulation, choosing to decide certain threshold policy issues by rulemaking and to leave others subject to ad hoc adjudication and the exigencies of the open market.[24] On the one hand, this approach reflects a realization by the Commission that interim development will substantially determine long-term DBS policy, given the substantial lead times[25] and enormous investments[26] involved, and that, therefore, certain basic issues should be decided at the outset. The Commission noted that a rulemaking procedure provides an opportunity for interested parties to express their views, which is especially important in a situation where, as here, authorization of development will have major permanent policy implications.[27] On the other hand, this approach reflects a belief by the Commission that delaying implementation of the new technology in a drawn-out rulemaking procedure clearly would not be in the public interest.[28] Underlying this aspect of the FCC's judgment is a belief that, at least initially,

22. SEC v. Chenery Corp., 332 U.S. 194, 203 (1946).

23. *Id.* at 202.

24. See notes 110-114 and accompanying text, *infra*.

25. It is estimated that a lead time of at least three years is required to construct a direct broadcast satellite. *See* Interim Notice, 86 F.C.C.2d at 741. *See also* F. SETZER, B. FRANCA & N. CORNELL, FCC POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES (1980) [hereinafter cited as OPP STAFF REPORT ON DBS] (a staff report by the FCC's Office of Plans and Policy). The expected lifetime of a satellite is seven to ten years. Interim Notice, 86 F.C.C.2d at 742.

26. The estimated cost of constructing a direct broadcast satellite is $250 million. OPP STAFF REPORT ON DBS, *supra* note 25, at 9 n.20 (information based on discussions with Comsat representatives).

See also Direct Broadcasting to Home Satellites - Boon or Bane to Broadcasting, Cable and the Public: A Panel Discussion, 22 JURIMETRICS J. 121, 133-134 (1982) (transcript of proceedings held at the A.B.A. annual meeting in New Orleans on Aug. 7, 1981), estimating the cost of a DBS *system* at from $500 million to $750 million.

27. Interim Order, 47 Fed. Reg. at 31,556. *See also* Interim Notice, 86 F.C.C.2d at 726.

28. *See* Interim Order, 47 Fed. Reg. at 31,558-31,559.

many aspects of the new and untried DBS technology should be worked out in the open market and that the FCC should not act on certain regulatory issues until it has developed a substantial base of empirical data upon which informed regulatory decisions can be based.[29]

The FCC's decision to make only limited use of its rulemaking power with regard to entry policies for DBS was largely influenced by a similar system adopted by the Commission a decade ago for market entry of domestic communications satellites, commonly referred to as the "multiple entry policy." The multiple entry policy provided for a limited regulatory structure allowing any qualified entity to launch a domestic communications satellite system subject to certain technical and antitrust restrictions.[30] In the interim DBS proceedings the Commission stated that, when considering DBS applications, "our policy . . . will be to maintain a flexible and open approach that is patterned after the open entry policy we have used for the domestic satellite service."[31] The Commission colloquially refers to its policy for DBS as the "open skies policy."[32]

III
Public Interest Determinations

A. Basic Findings

In the DBS proceedings, the FCC determined that both permanent and interim authorization of DBS is in the overall public interest. Given the long-lasting implications of early DBS development[33] the Commission felt that a basic finding of "the public interest" in the *permanent* establishment of nationwide

29. *Id.* at 31,568.

30. Thus, while the FCC refused to select a certain type of market structure as the optimal configuration for domestic communications satellites it did restrict the permissible scope of involvement of certain large carriers, particularly AT&T, and required domestic satellite companies to provide a variety of services. This policy reflects an effort by the FCC to balance competition and regulation. Second Report and Order In the Matter of Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C.2d 844 (1972).

31. Interim Notice, 86 F.C.C.2d at 728. *See also* Interim Order, 47 Fed. Reg. at 31,568, stating that "during this interim period, we will . . . process applications and grant authorizations under a scheme patterned after Part 5 of the Commission's Rules and the 'open entry' policy successfully used in the domestic satellite field."

32. Interim Order, 47 Fed. Reg. at 31,564.

33. See notes 46-50 and accompanying text, *infra*.

DBS systems was necessary in the *interim* authorization stage. In addition, the FCC determined that there are several separate public interest factors involved in the interim authorization of DBS. In making a preliminary assessment of the public interest factors inherent in this new technology the FCC proceeded in accordance with parts 5[34] and 74[35] of its rules which require the FCC to determine that the public interest convenience and necessity support development of new communications technology.

In determining the public's interest in the permanent establishment of DBS, the Commission noted the following benefits of DBS: (1) the unique capacity of DBS to provide telecommunications services, especially to rural and remote areas; (2) the additional channel capacity and consequent greater diversity that DBS will provide; (3) the expansion of the program production industry that will result from additional program demand generated by DBS; (4) the greater programming specialization that will be provided by DBS systems operating in subscription mode; (5) the potential of DBS to provide educational programming and the dissemination of medical information; (6) the potential of DBS to operate as a vehicle for new video services such as high definition television.[36]

B. Policy of Expeditious Development

Pursuant to the determination that DBS is in the public interest, the Commission decided to proceed expeditiously in processing interim applications to provide DBS service.[37]

34. 47 C.F.R. § 5.253(e) provides that "frequencies will not be assigned for the development of a service for which no frequencies have been allocated until the Commission has made a preliminary determination that the public interest, convenience or necessity would be served by the establishment of the service."

35. 47 C.F.R. § 74.103(d) provides that an "experimental operation which looks toward the development of radio transmitting apparatus or the rendition of any type of regular service using such frequencies will not be authorized prior to a determination by the Commission that the development of such apparatus . . . would serve the public interest."

36. Interim Notice, 86 F.C.C.2d at 728-729. *See also* Interim Order, 47 Fed. Reg. at 31,558.

37. *See* Eight Direct Broadcast Satellite Applications Accepted for Interim Processing: Six Rejected as Incomplete and Eliminated from First-Priority Consideration, 46 Fed. Reg. 54,796 (1981). The Commission accepted the applications of CBS, Inc., Direct Broadcast Satellite Corporation, RCA American Communications, Inc., Graphic Scanning Corporation, United States Satellite Broadcasting Company, Video Satellite Systems, Inc., and Western Union Telegraph Company for further consideration. These applications will be considered along with the application of Satellite Tele-

Three factors were central to this aspect of the FCC's determination. First is the FCC's sporadic policy of encouraging the earliest possible development of new communications technologies. The Commission stated that:

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vision Corporation which was accepted April 21, 1981 at the Interim Notice, 86 F.C.C.2d at 719. The Commission rejected the applications of Advance, Inc., Home Broadcast TV Partners, National Christian Network, Inc., Satellite Development Trust and Unitel Corporation as being substantially incomplete. The rejected applicants will not be precluded from amending their applications but will be given lower priority in comparative proceedings, if they become necessary, after frequencies and orbital slots available to the United States are determined at RARC-83. In addition, the application of Focus Broadcast Satellite Company was accepted in part and rejected in part. The Commission accepted for further consideration the proposal of Focus to provide services via Western Union's Advanced Westar Satellite and rejected the proposal of Focus to build and operate its own satellite system.

The Commission's views with regard to these applications are more fully set forth in Application of Advance, Inc., 88 F.C.C.2d 100 (1981) (pages renumbered). In adhering to a rigid cutoff date for filing acceptable DBS applications, the Commission stated:

> Our adherence to principles that preserve the integrity of this cutoff procedure serves the policy stated in this docket of promoting the expeditious processing of DBS applications in order to encourage the rapid introduction of new services. Because of the exceptionally long lead time required for satellite construction, we continue to believe that prompt consideration and authorization of experimental DBS proposals is an important adjunct to our goal of achieving early inauguration of the service. . . . By providing an incentive for applicants to formulate and submit their proposals expeditiously, the cutoff mechanism supports and enhances this policy aim.

Id. at 108.

The dissenting opinion of Commissioner Anne P. Jones, however, forcefully argues that the Commission is acting too hastily with regard to the interim authorization of DBS, stating that "we are rushing to judgment based upon too little information and deliberation." *Id.* at 117. Commissioner Jones raises the question:

> Why are we being so exclusionary so early in the process?
>
> The answer, of course, is that it is *not* early in the process and that the whole concept of an "interim" DBS system is an illusion. There is very little that is interim in what we are doing here.
>
> The Commission will very soon be able to authorize the construction of these "interim" systems. Indeed, authorization may come before the 1983 Regional Administrative Radio Conference (RARC), which is to address the allocation of spectrum and orbital slots from DBS in the Western Hemisphere. Unless we intend to be hemispheric hogs of spectrum and orbit, why do we wish to present the RARC with a fait accompli?

Id. at 116.

The separate statement of Commissioner Mimi Weyforth Dawson expresses concern that strict adherence to the cutoff date will limit the future of DBS. *Id.* at 119. Commissioner Dawson states that "DBS is a new service and I do not believe we should exclude potential parties or services at this early date. I believe we should remain as expansive as possible for as long as possible." *Id.*

See also Application of Advance, Inc., 89 F.C.C.2d 177 (1982), wherein the Commission denied petitions for reconsideration of its ruling that certain direct broadcast satellite applications were incomplete and unacceptable for filing.

An appeal of these decisions is pending. National Christian Network, Inc. v. FCC, No. 82-1345, (D.C. Cir. appeal filed March 31, 1982).

> an important aspect of our statutory mandate to "encourage the larger and more effective use of radio" is to ensure that the benefits of new communications services are made available to the American people in the most timely manner possible.[38]

The implementation of DBS service would be impeded by waiting for permanent policy determinations to be made after RARC-83, especially given construction or lead times of three years or more.[39] Second is the FCC's determination that experimental DBS systems will provide valuable technical and marketing experience.[40] For instance, the demand for DBS services will indicate the amount of spectrum space the systems will require as well as the type and extent of regulatory structure needed to preserve a competitive market.[41] Third is the FCC's purely pragmatic determination that the congruence of substantial satellite construction times and relatively short satellite equipment lives will allow major policy modifications with relative ease.[42] The substantial construction times involved in the development of DBS systems (at least three years) mean that no DBS system will be ready for launch until permanent policies are promulgated subsequent to RARC-83. Any essential modifications needed to bring the developmental systems into line with permanent policies can therefore be made prior to launch. The brevity of anticipated satellite equipment lives (seven to ten years) is deemed by the FCC to be advantageous in that "policies adopted for a first generation of satellites can be modified for later generations without greatly affecting the interests of the owner of the initial system."[43] In passing, the Commission noted that some policy modifications could require equipment changes and the imposition of severe costs on either the operator of the DBS system or on the public. The interim rulemaking for DBS raised the possibility, for instance, that "some changes in technical parameters would make transmissions from later satellites incompatible with receiving equipment owned by the public."[44]

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38. Interim Notice, 86 F.C.C.2d at 741.

39. See note 25, *supra*.

40. Interim Notice, 86 F.C.C.2d at 742.

41. See text accompanying notes 110-120, *infra*.

42. Interim Notice, 86 F.C.C.2d at 742. While the FCC may be theoretically correct, in practice it will be nearly impossible for the FCC to modify its policies regarding the types of services provided and by whom. See notes 46-50 and accompanying text, *infra*.

43. *Id.*

44. *Id.* at 742 n.50.

However, the Commission has indicated a willingness to discount these potential problems in light of what it regards to be the more important determination that the earliest possible deployment of DBS is in the public interest.[45]

C. De Facto Standards

The notion that equipment or policy modifications may easily be made, however, is largely unrealistic. The Commission recognized this fact at various points in the DBS proceedings. For example, the license conditions adopted for DBS provide that while DBS systems will be subject to any policies and rules the Commission may later adopt, "in most circumstances the regulatory policies in force at the time of authorization to construct a satellite shall remain in force for that satellite throughout its operating lifetime."[46]

Indeed, it is quite unlikely that major technical modifications will be imposed on initial DBS operators. Initial DBS companies, each with several hundred million dollars invested in a particular technical and equipment configuration, will essentially set de facto operating standards for the industry. For this reason, the interim proceedings for DBS have every characteristic of permanent policy making.[47] The Commission recognized that the large number of authorizations to provide DBS service in the near future, with the consequent enormous investment involved, "is likely to have a major and permanent effect on the use of the band. . . ."[48] The Commission is convinced, however, that the DBS technology will evolve quickly and will be responsive to consumer demand.[49] In light of the FCC's determination that DBS entrepreneurs will have strong incentive to make "correct" technical judgments, the Commission stated that:

If an initial DBS system sets de facto technical standards for

45. See notes 37-42 and accompanying text, *supra*.

46. 47 Fed. Reg. 31575 (1982) (to be codified at 47 C.F.R. § 100.19).

47. *See* Concurring Statement of FCC Commissioner James H. Quello, Interim Order, 47 Fed. Reg. at 31,577, Commissioner Quello argued that:

> While this Report and order has been characterized as an "interim" action, it clearly authorizes a new service which has the potential to dramatically change the current pattern of video distribution in this country. Given the huge capital resources required to participate in this "interim" venture, it is unlikely that the Commission will embark upon a different course once the resources have been committed and the service has begun.

48. Interim Order, 47 Fed. Reg. at 31,556.

49. *Id.* at 31,571.

> the service, we have no reason to believe that those standards would necessarily be less appropriate than any standards the Commission might impose at this time.[50]

Clearly, the FCC is placing an enormous policy burden on the market economy in a sphere where, because of the high level of investments involved, technological determinations will be difficult to reverse. This reaction to DBS, the cutting edge of new communications technology, indicates a changing attitude at the FCC about the proper way to safeguard the public good in the communications field.

D. Existing Users of the Spectrum

The FCC also balanced the public interest factors favoring early DBS development with the interests of the existing users[51] of the frequency spectrum band which is being set aside for DBS broadcast operations (the 12.2 to 12.7 GHz band). The Commission determined that the interests of the current users of the band do not override the interests involved in the introduction of DBS.[52] This position reflects a Commission judgment that the potential benefits of DBS are great and that some adjustment by other telecommunications services to accomodate DBS is therefore justified.[53]

The Commission stated that:

> [W]e believe that the concerns of the present operational-fixed microwave users deserve serious attention. We do not believe, however, that our concern for these terrestrial users should preclude the introduction of DBS service. We believe that the potential benefits of DBS justify some adjustments in other services. Furthermore, we believe that interim rules and policies can be established that permit DBS operation with minimal impact on existing 12 GHz terrestrial users.[54]

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50. *Id.* *See also* Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C.L. REV. 1057 (1982).

51. The Commission estimates that about 1900 radio links are currently licensed in the 12 GHz band. A radio link is defined as a one-way transmission on a single discrete frequency between a transmitter and a receiver. "These systems provide private, industrial, transportation, and safety (PITS) services and are used, for example, by local governments, banks, newspapers, railroads, utility companies, universities, and colleges." *Id.* at 31,564.

52. *Id.* *See also* Interim Notice, 86 F.C.C.2d at 730.

53. Interim Order, 47 Fed. Reg. at 31,564. *See also* Interim Notice, 86 F.C.C.2d at 732.

54. Interim Order, 47 Fed. Reg. at 31,564.

It will not be known precisely which frequencies will be allocated to DBS systems providing transmissions to the United States until RARC-83. Thus, it is impossible to determine precisely which current operations in the 12.2 and 12.7 GHz band may interfere with DBS operations. Nevertheless, the FCC has put all existing users on notice. The Commission stated that "the terrestrial users will be subject to reassignment within the 12 GHz band or other appropriate bands if they cause interference to a DBS system and cannot adjust their technical parameters to eliminate the interference."[55]

As intimated in the *Notice*,[56] the Commission will allow current licensees to remain in the band for a specific period of time without being required to protect DBS systems from interference. The Commission will allow current terrestrial users to remain on current terms for five years from the issuance of a final *Report and Order* allocating alternative frequency bands for terrestrial use.[57] Subsequent to the expiration of that period, terrestrial users will be required to make all adjustments necessary to prevent interference with DBS systems.[58] Terrestrial operators entering the band subsequent to the final *Report and Order* will be required to avoid interference with DBS systems.[59]

This scheme is designed to reduce the costs of terrestrial relocation, permitting current terrestrial users to move to new frequencies in the normal course of equipment replacement. Under the scheme, a DBS operator confronted by interference prior to expiration of the five year grace period could (1) compensate the terrestrial operator for its move, (2) develop receiving equipment that could provide acceptable service despite interference, or (3) simply not operate until the terres-

55. Interim Notice, 86 F.C.C.2d at 732.

56. *Id.* at 733.

57. The DBS regulations provide that:

> Operational-fixed stations authorized in this band prior to the issuance of a *Report and Order* allocating alternative frequency bands for the operational-fixed service shall not be required to protect domestic broadcasting-satellite systems from interference for a period of five years from the date of issuance of that *Report and Order*.

47 Fed. Reg. 31574 (1982) (to be codified at 47 C.F.R. § 94.65(h)). The Commission expects that the final *Report and Order* will be acted upon within six weeks of the completion of the RARC-83 which begins June 13, 1983 and is expected to last five weeks. The five-year grace period is thus expected to begin September 4, 1983. Interim Order, 47 Fed. Reg. at 31,566.

58. 47 Fed. Reg. 31574 (1982) (to be codified at 47 C.F.R. § 94.65(h)).

59. *Id.*

trial user relocates.[60] The Commission believes that DBS operators will have strong incentive to compensate current users for the costs of moving to other frequency bands should interference problems develop during the five year period because it assumes that DBS systems represent a more valuable and thus more profitable use of the band.[61]

However, if DBS operators do not compensate terrestrial users for the costs of relocating, terrestrial operators will eventually be straddled with costs of over $88,000 each in effecting a move to reassigned frequencies.[62] In addition, it is estimated that terrestrial operators currently have $270 million invested in equipment that is useful only in the 12 GHz band.[63] In light of the certain hardships that will be imposed upon most, if not all, terrestrial users one may well question the Commission's public interest determinations.

IV
Impact on Local Broadcasters

A. Localism Policy

The encouragement of local broadcasting has been a fundamental goal of the FCC's television regulation. The potential disruption of local broadcasting services by DBS is a major issue with which the FCC has had to deal in the DBS proceedings.

DBS is by nature national or semi-national in scope since it is capable of serving broad geographic areas. As a result, DBS is predisposed to operate on a level which will not emphasize the needs of local communities. DBS transmissions can be designed to cover relatively small geographic areas,[64] but to require this approach would seem to ignore a basic advantage of the technology; its ability to provide broad-based services. Most interim DBS proposals, for instance, contemplate cover-

60. Interim Notice, 86 F.C.C.2d at 733-734.

61. Interim Order, 47 Fed. Reg. at 31,566 n.60.

62. *Id.* at 31,565 n.56.

63. *Id.*

64. *See The Development of Video Technology*, *supra* note 4, at 810 n.168: "Although a communications satellite is capable of 'seeing' as much as one-third of the earth's surface, the transmitting antennas located on the satellites can be designed to 'illuminate' discrete positions of the earth." For purposes of program coordination it may well be most desirable to confine DBS transmissions to a single time zone.

age by time zone.[65] DBS systems will bypass conventional television transmitters and cable television networks and will essentially have no terrestrial base. In fact, a special staff report prepared for the FCC determined that the provision of network programming by DBS would constitute "networking without affiliates"[66] in that DBS systems will completely bypass local distribution facilities.

Section 307(b) of the Communications Act[67] has traditionally been construed to embody the concept of localism in the Commission's distribution of licenses, frequencies, hours of operation and power.[68] Traditionally the FCC has carried out the mandate of this section "by insuring that viewers would be provided service via a system of locally-assigned channels as opposed to regional or even national channels."[69] This has been the result of the FCC's interpretation of the language of section 307(b) as requiring an equitable distribution of television *stations* among the several states and communities rather than as requiring an equitable distribution of television *service* among the several states and communities. This policy was reflected in the Commission's 1952 television station assignment plan[70] under which one to nine commercial television channels were assigned to each of 1260 geographical 'markets' in the country.[71]

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65. See note 64, *supra*.

66. FEDERAL COMMUNICATIONS COMMISSION, NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION I-103 (1980) [hereinafter cited as NETWORK INQUIRY SPECIAL STAFF REPORT].

67. 47 U.S.C. § 307(b) (1976) provides:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

68. *See* Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 362 (1955). "Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." *Id. See also* Pinellas Broadcasting Co. v. Federal Communications Commission, 230 F.2d 204, 207 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007. "In requiring a fair and equitable distribution of service Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self expression." 230 F.2d at 207.

69. NETWORK INQUIRY SPECIAL STAFF REPORT, *supra* note 66, at I-52.

70. Sixth Report and Order, 41 F.C.C. 148 (1952).

71. NETWORK INQUIRY SPECIAL STAFF REPORT, *supra* note 66, at I-5.

B. Section 307(b) Applied To DBS

In its interim rulemaking for DBS and FCC declined to interpret section 307(b) as requiring that it authorize only locally-based communications services.[72] The Commission took the position that the statutory scheme merely requires that it make an equitable distribution of television service and that the means to accomplish that goal are within the Commission's discretion. Thus, the FCC has taken the position that, while the concept of localism is often an excellent means of achieving the goal of equitable distribution, section 307(b) "does not foreclose other, or additional, means of fairly, efficiently, and equitably distributing radio service among the several states and communities."[73]

A significant part of the Commission's concern is that it must be responsive to the need for incorporation of new communications technologies reflecting the view that it would be unreasonable to halt or even restrict the development of a beneficial new telecommunications technology based on an unduly parochial construction of the Communications Act. In fact, the Commission has indicated that its mandate to encourage the development of new telecommunications systems under section 303(g) of the Act[74] would be violated by such an approach.[75] In the context of DBS development the Commission appropriately chose to rely on its broad powers under the Communications Act to attain the statutory goal of a rapid, efficient, nationwide wire and radio communications service. In this regard the FCC, in its interim rulemaking for DBS, relied on *FCC v. National Citizens Committee for Broadcasting*,[76] which held that the Commission has authority to construct "a reasonable administrative response to changed circumstances in the broadcasting industry."[77] The case also held that the FCC may give "controlling weight in some circumstances to its more general goal of achieving 'the best practicable service to the public.' "[78]

72. Interim Order, 47 Fed. Reg. at 31, 559. Interim Notice, 86 F.C.C.2d at 736.

73. Interim Notice, 86 F.C.C.2d at 737.

74. 47 U.S.C. § 303(g) (1976).

75. Interim Notice, 86 F.C.C.2d at 737.

76. 436 U.S. 775 (1978).

77. *Id.* at 797.

78. *Id.* at 810.

C. Effectiveness of Localism Policy

An unswerving reliance on the concept of localism would seem unreasonable given that in any event network programming of national scope already dominates the television distribution system. The FCC's encouragement of locally-based television stations reflects the laudable goal of fostering a broadcasting system which is responsive to local interests. The extent to which the national network distribution system already detracts from this goal cannot be overlooked, however, in any analysis of a new telecommunications service which, like DBS, does not have a local base.

In analyzing the potential impact of DBS on local broadcasting it is important to realistically gauge the present impact of local broadcasting. Nationally-distributed programming is the dominant force in the dissemination of television programming. Most local broadcasters are economically disadvantaged in developing or providing truly localized broadcasting. One reason may be that the broadcasting industry particularly lends itself to national systems of distribution. The FCC's Network Inquiry Special Staff recognized this in stating:

> [T]he underlying economics of television assure the dominance of nationwide distribution methods. Once a program is produced for viewers in one city, showing it elsewhere involves only the additional costs of distribution. It is unthinkable that television could be a largely localized industry any more than could book or magazine publishing.[79]

The system of local television distribution is designed to foster a multitude of viewpoints in broadcasting as each local station selects programming which is appropriate for viewers in its area. This promotes the dispersal of political and cultural control to localized entities. However, the meaning of the concept of localism has never been precisely defined and the exact goals of the FCC's policy of localism are obscure. In some cases the term "localism" has been identified with a notion that individual choice should govern the nature and content of programming in the community. By contrast, the term "localism" has at other times been used to designate "a policy that values the identity of a community rather than the notion of individual choice."[80]

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79. NETWORK INQUIRY SPECIAL STAFF REPORT, *supra* note 66, at I-139.

80. *Id.* at I-471.

Given the uncertainties underlying the policy favoring localism and the practical ineffectiveness of that policy, a departure from the concept of localism in instituting a new telecommunications technology does less damage to citizen control over the broadcasting system than might initially be expected. This is not to say that the concept of localism has no role to play in encouraging concern for local environments and local issues in the conventional television distribution industry. However, it is doubtful that the policy of localism ought to constrain the development of new communications technologies that, like DBS, are national in nature.

D. FCC Determination of Impact on Local Broadcasters

The FCC, in the DBS rulemaking, discounted the impact of DBS on local broadcasters by determining that the likely scale of penetration by DBS into local broadcasting markets would be negligible and, at the very least, far outweighed by the beneficial aspect of DBS.[81] In this regard the Commission apparently adopted the views of a staff report by its Office of Plans and Policy[82] that determined that DBS will operate in a highly competitive market with other new communications technologies[83] offering services similar to those provided by DBS. In addition, the report estimated that equipment costs for DBS will be relatively high and that DBS operators will be forced by marketplace considerations to offer services that are considered superior to those provided by conventional broadcasters.[84] The report predicted that "In the beginning . . . since the equipment will be expensive and owned by few households, DBS will have to attract an audience by offering premium programming that is considered superior to that provided by advertiser-supported over-the-air broadcasters."[85] In the context of these projected marketplace and technical difficulties the FCC determined that the impact of DBS on locally-based systems of program distribution will probably not be substantial.[86]

The Commission relied solely on three reports to show empirically that the expected scale of market penetration by DBS

81. Interim Order, 47 Fed. Reg. at 31,561. Interim Notice, 86 F.C.C.2d at 741.

82. OPP STAFF REPORT ON DBS, *supra* note 25.

83. The new technologies enumerated by the staff are cable, subscription television (STV), multi-point distribution service (MDS), video cassettes and video discs.

84. OPP STAFF REPORT ON DBS, *supra* note 25, at 10.

85. *Id.*

86. Interim Notice, 86 F.C.C.2d at 741.

will be negligible.[87] This aspect of the Commission's DBS rulemaking shows, more than anything else, the FCC's general lack of concern with the impact of DBS on local broadcasters. The first of the studies[88] was an econometric analysis by the National Cable Television Association of the penetration into local broadcast markets of cable systems engaged only in retransmission of over-the-air signals.[89] The study found that the impact of this form of cable television was negligible, causing less than a ten percent decline in local audiences.[90] Most importantly, this report, in analyzing cable systems that only retransmit the signals of conventional broadcasters, did not attempt to measure the impact on local broadcasters of a new telecommunications system, such as DBS, that will provide a different line of programming as well as a different form of program delivery. Further, there is some indication that cable systems that merely retransmit over-the-air signals may actually increase the audiences of local stations by improving their reception quality within the local communities themselves.[91]

The second study[92] was a non-quantitative assessment, conducted for the National Association of Broadcasters, of the projected impact of pay-DBS systems on local advertiser-supported broadcasters. The report concluded that pay-DBS systems will penetrate local broadcasting markets only to a negligible extent.[93] Thus, the major competitive impact of DBS systems was estimated to be upon other new technologies providing pay communications services.[94] It is not at all clear, however, that DBS will be confined to a pay service mode, and in fact several of those filing applications to provide DBS services under the FCC's rulemaking procedure have proposed advertiser-supported systems.[95] Accordingly, to the extent that

87. *Id.* at 737-741.

88. National Cable Television Association, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, *cited in* Interim Notice, 86 F.C.C.2d at 738.

89. A cable system which retransmits over-the-air signals merely rebroadcasts the programming of a conventional local station over its system to a larger region.

90. Interim Notice, 86 F.C.C.2d at 739.

91. *Id.*

92. Ayvasian, Blake & Cantor, Direct Broadcast Satellites: Preliminary Assessment of Prospects and Policy Issues, Kalba Bowen Associates, *cited in* Interim Notice, 86 F.C.C.2d at 738.

93. *Id.*

94. *Id.*

95. Conversation with Florence Setzer, FCC Office of Plans and Policy (December 2, 1981).

this study analyzed DBS' projected impact only in terms of the pay television broadcasting market, it failed to fully appreciate the potential impact of DBS. As there is every indication that DBS will operate in both pay-supported and advertiser-supported modes of service, DBS has a far broader potential impact upon local and national advertiser-supported broadcast systems than was indicated by this study.

The third study[96] conducted for Satellite Television Corporation, used an econometric analysis to project the impact of the audience diversion from local broadcasting to pay-DBS. The study focused on the relative attractiveness of pay-DBS and competing pay services, concluding that DBS will have a negligible impact on local broadcasting.[97] Apart from the assumption that DBS systems will operate solely in a pay-service mode—an unrealistic view taken in the third as well as second study—the data utilized in the third study may itself be unreliable. The Commission has stated that estimates from the study "must be used with caution, in part because of the possibility of large statistical errors."[98] Furthermore, the study's assumption that DBS systems will provide only three channels of programming[99] may prove to be highly unrealistic.[100]

The point here is not to dwell on the possible inaccuracies of the data used by the Commission but rather to indicate the lack of serious thought accorded to the issue of the impact of DBS on local broadcasters. The FCC is, rightly or wrongly, unwilling to excessively delay the implementation of technologi-

96. Satellite Television Corporation, Pay Television Services via Direct Broadcast Satellites: Demand and Impact in the 1980's, Arthur D. Little, Inc., *cited in* Interim Notice, 86 F.C.C.2d at 740.

97. Given viewers' preferences in 1979, a three-channel DBS system priced at $20 a month in competition with pay cable was estimated to attract from 1 to 8 percent of television households, depending on how different the programming and other characteristics of DBS were perceived to be from those of other pay services. With no pay video competition, penetration would range between 12 and 16 percent. At $24 per month, DBS penetration was estimated at between 0 and 6 percent in competition with pay cable and between 9 and 12 percent with no competition. We should note that STC (Satellite Television Corporation, an applicant for interim DBS development) plans to charge between $14 and $18 per month for programming and an additional $6 to $10 per month for leased equipment.

Id.

98. *Id.*

99. See note 97, *supra*.

100. Conversation with Florence Setzer, FCC Office of Plans and Policy (December 2, 1981).

cal changes in the communications industry.[101] In addition, there is no statutory requirement that the Commission rigidly adhere to the concept of localism[102] and it seems clear that it has been unwise in the past for the Commission to constrain the development of new communications technologies.[103] The primary effect of such constraints in the past may merely have been the protection of existing licensees from competition. Nevertheless, it should be noted that the FCC appears willing to proceed in an atmosphere of relative uncertainty as to the ultimate market impact of DBS. This is perhaps the most realistic policy to adopt and may be the best means by which to gain practical knowledge about the market characteristics of the new technology. It certainly reflects a move away from the imposition of regulations[104] and constraints upon emerging unfamiliar technologies. There may also be a strong element of technological determinism in this attitude wherein the Commission sees its most important function as avoiding interference with the inevitable array of marketplace and technological changes in communications.

E. Focus on Overall Impact

The FCC will consider economic harm to individual broadcasters only as it relates to the overall impact on consumers. The Commission is concerned only with the ultimate effect on service to consumers, not with the profitability of specific broadcasters.[105]

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101. It may be that the Commission is reacting mainly to prevailing political realities in this regard. It is clear that the Commission's stance on the development of DBS, as expressed in its interim rulemaking, is in accord with the views of the Reagan Administration. Secretary of Commerce Malcolm Baldridge has expressed the Administration's support for as rapid a development on DBS as possible, and an official of Commerce's National Telecommunications and Information Administration stated, after the Commission released its interim notice for DBS, that "the FCC did what we want it to do. . . . We didn't want to stand in the way of new technology." BROADCASTING, April 27, 1981, at 30.

102. See text accompanying notes 72-78, *supra*.

103. Two primary examples of policies that may have adversely affected the financial viability and competitive prospects of emerging telecommunications services are restrictions on distant signal carriage by cable television systems and anti-siphoning restrictions on pay programming services. *See* NETWORK INQUIRY SPECIAL STAFF REPORT, *supra* note 66, at I-105-120. The report argues that regulatory barriers imposing restrictions as to service offerings by cable and subscription television (STV) stunted the growth of those services and that relaxation of those barriers has substantially contributed to their growth.

104. See text accompanying note 150, *infra*.

105. Interim Notice, 86 F.C.C.2d at 738.

> The Commission is required to consider the economic effect of a new service on existing broadcasters only if there is strong evidence that a significant net reduction in service to the public will result. The Commission cannot reject a new service solely because its entry will reduce the revenues or profits of existing licensees.[106]

Essentially, the burden of proving the adverse effects of a new service on the public interest rests with those opposing the new service, in this case the broadcasters. The FCC determined that there is "no hard evidence that DBS systems will have a critically adverse effect on existing broadcast service."[107] Thus, the burden of proof was not met by opponents of DBS. It is important to note, however, that this is a decision made largely in the dark, by default. As the Commission stated:

> [W]e cannot predict how many DBS systems will actually go into operation in the foreseeable future, and we have too little experience with markets having large numbers of video channels to predict viewers' response to the availability of additional channels in such markets.[108]

The Commission determined that any adverse impact on local broadcasting will be outweighed by the benefits of DBS.[109] This is an uncertain judgment, however, and may fail to take into account that what is sacrificed in terms of local broadcasting may well be irreplaceable.

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106. Interim Order, 47 Fed. Reg. at 31,561.

This is established FCC policy. For an early example see FCC v. Sanders Radio Station, 309 U.S. 470, 473 (1940), where the Supreme Court held that:

> Resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner (FCC) must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.

Furthermore, the court held that:

> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it.

Id. at 475.

107. Interim Order, 47 Fed. Reg. at 31,561.

108. *Id.*

109. *Id.* at 31,558.

V
Interim Regulatory Scheme

A. Policy of Minimal Regulation

In establishing interim regulatory policies for DBS the FCC has determined that the most desirable course of action is to impose as few rules as possible in the experimental stage.[110] The Commission determined that an "open and flexible approach"[111] will create a developmental environment in which the business judgments of individual DBS entrepreneurs, rather than the regulatory structure, will ultimately determine the characteristics of DBS service. The FCC decided that experimentation and innovation are especially valuable during the introduction of a new technology such as DBS and that "the public interest will be best served by a regulatory policy that is flexible enough to allow for different system approaches in the interim period."[112] By using this approach, the Commission hopes to retain substantial flexibility for drafting future regulatory policies, if it is later determined that the imposition of regulatory constraints would be desirable.[113] This approach reflects, on the one hand, a faith that marketplace mechanisms will produce the optimal form of service and, on the other hand, a belief that DBS entrepreneurs will have more resources and better information than the Commission, as well as strong financial incentives to develop systems which the public demands through the marketplace.[114]

B. Mechanics of Interim Regulations

The FCC will impose on developmental DBS systems only

110. *Id.* *See also* Interim Notice, 86 F.C.C.2d at 750.

111. Interim Notice, 86 F.C.C.2d at 750.

112. *Id.* at 752.

113. Such constraints would be applicable to all developmental DBS systems and DBS operators will assume the risk that the Commission may impose restrictive rules and policies. *Id.* at 752-753.

But see 47 Fed. Reg. 31575 (1982) (to be codified at 47 C.F.R. § 100.19(a)) which provides:

> All authorizations for interim direct broadcast satellite systems shall be subject to the policies set forth in the *Report and Order* in General Docket 80-603 and with any policies and rules the Commission may adopt at a later date. It is the intention of the Commission, however, that in most circumstances the regulatory policies in force at the time of authorization to construct a satellite shall remain in force for that satellite throughout its operating lifetime.

See also text accompanying notes 46-50 *supra*.

114. Interim Order, 47 Fed. Reg. at 31,570.

the regulations it must under provisions of the Communications Act.[115] Interim DBS applicants will not be required to conform to any particular regulatory model but rather will be regulated by the statutory requirements of the conventional regulatory classification into which they fall. The Commission stated that "[i]f the proposal falls within any of the conventional regulatory classifications for radio services, i.e., broadcast, common carrier, or private radio, we will impose the statutory requirements of that service."[116] Applicants, therefore, will be able to choose the regulatory scheme under which they will operate by choosing the particular characteristics of the service they propose. Important characteristics include "the proposed method of financing, whether the service would be offered to the general public, and the degree of control the applicant would exercise over program content."[117]

Thus, the Commission stated that:

> [I]f an applicant proposes to provide direct-to-home service and retains control over the content of the transmissions, then the service is probably a broadcast service and the broadcasting provisions of Title III will apply. . . . [I]f a DBS applicant chooses to operate as a common carrier, it must offer its satellite transmission services indiscriminately to the public pursuant to tariff, under the provisions of Title II of the Act. . . . We see no reason, furthermore, why a DBS operator could not function as broadcaster with respect to some channels and a common carrier with respect to others.[118]

In the Commission's view the main benefit of this policy is that it will allow a practical determination as to which regulatory constraints are necessary or desirable.[119] A policy of flexibility in the developmental stage of DBS will allow the Commission to make a judgment as to the appropriate regulatory scheme for DBS based on practical experience with the workings of the new technology and its market acceptance. While this policy is directly applicable only to the interim developmental stage of DBS and the Commission has explicitly stated that interim DBS systems may be subject to more stringent regulations and restrictions under the permanent regula-

115. *Id.* at 31,567. *See also* Interim Notice, 86 F.C.C.2d at 750.

116. Interim Notice, 86 F.C.C.2d at 750 n.64.

117. *Id.*

118. Interim Order, 47 Fed. Reg. at 31,568-31,569.

119. *Id.* at 31,567.

tory scheme,[120] it may indicate a fundamental change of heart at the FCC regarding the appropriateness of imposing comprehensive regulatory schemes upon communications systems. The policy of flexibility adopted by the FCC for interim DBS systems is consistent both with a trend at the FCC toward deregulation of communications technologies[121] and with a regulatory approach, suggested by several commentators, requiring a closer analysis of the goals to be achieved by regulation.[122] The Commission's interim regulatory strategy for DBS is roughly in accord with both trends in that it errs, if at all, on the side of deregulation while attempting to retain flexibility for determining a permanent regulatory scheme.

The Commission also declined to impose any restrictions on multiple ownership and control, reasoning that such constraints are unnecessary either to prevent DBS operators from obtaining excessive market power or to assure diversity of programming.[123] Furthermore, the Commission refused to impose access requirements[124] or rules to assure responsiveness of DBS operations to audience needs,[125] reasoning that DBS operators will have sufficient economic incentive to respond adequately to viewers. It is highly doubtful that these policies adequately take the public interest into account. Marketplace forces do not produce sufficient access or representation for those who lack economic and political power. A marketplace solution leaves underrepresented groups out of the equation.

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120. "All experimental authorizations, however, will be subject to any further rules or policies that may be promulgated in subsequent rulemaking proceedings to devise permanent policies for this service." Interim Notice, 86 F.C.C.2d at 752.

121. *See, e.g.*, Deregulation of Radio, 73 F.C.C.2d 457 (1979). The trend is to rely on the interaction of economic forces in the pursuit of goals such as programming diversity.

See also Note, *Letting the Marketplace Select Radio Entertainment Formats*, 27 LOY. L. REV. 1250 (1981).

122. *See* O'Riordan, *An Examination of the Application of Common Carrier Regulation to Entities Providing New Telecommunications Services*, 29 CASE W. RES. L. REV. 577, 580 (1979). "[O]nce the FCC determines under any rationale that a new entity is a common carrier, regulation automatically ensues, even if there is no need for it. More appropriately, the FCC's evaluation should encompass an economic analysis of the new entity's activities. Once the FCC determines that a particular communications service is not vulnerable to monopolistic practices, regulation need not ensue, even if the entity is a common carrier 'in the ordinary sense of the term.'" *See also* Note, *The National Public Radio Satellite System: FCC Jurisdiction Over a New Communications Technology*, 8 J. COMPUTERS TECH. & L. 135 (1980).

123. Interim Order, 47 Fed. Reg. at 31,570.

124. *Id.*

125. *Id.* at 31,571.

It would be far preferable to institute access requirements at the onset of DBS while the technology is still in a formative stage of development. The Commission should take this opportunity to develop policies which represent the interests of the entire public. The Commission did, however, impose equal employment opportunity requirements on interim DBS operators[126] reasoning that "[e]mployment decisions made at an early stage in the organization of DBS systems may have a lasting impact on the representativeness of the workforce of DBS operators. . . ."[127]

Despite its basic hands-off regulatory approach, the Commission has retained authority to allocate orbital and frequency positions for interim DBS systems. This is the only area in which the FCC has assumed direct control over developmental DBS systems. Under section 303 of the Communications Act of 1934[128] the FCC has the responsibility to allocate "frequency bands of the electromagnetic spectrum among various uses and [to assign] rights to the use of specific frequencies to particular users. . . ."[129] The Commission determined that, as orbital and frequency positions are a scarce resource and an explicit market price for their utilization does not exist, "market forces will not lead to standards for orbit and spectrum utilization that properly take into account the scarcity of orbit and spectrum space."[130]

The task of spectrum management is thus the only area in the interim developmental scheme for DBS in which the Commission has not entrusted the marketplace mechanism to arrive at an optimal solution. This is attributable to two main considerations. First, the allocation of frequencies and orbital positions is in large part an international issue wherein the Commission will be bound by the terms of international agreements reached at RARC-83. The Commission is currently engaged in active preparation for the conference, having requested public comment on possible negotiating positions[131] and having established an advisory committee to deal with conference preparations.[132] Second, orderly spectrum manage-

126. 47 Fed. Reg. 31575 (1982) (to be codified at 47 C.F.R. § 100.51).
127. Interim Order, 47 Fed. Reg. at 31,571.
128. 47 U.S.C. § 303 (1976).
129. OPP STAFF REPORT ON DBS, *supra* note 25, at 33.
130. Interim Notice, 86 F.C.C.2d at 749.
131. Notice of Inquiry, 45 Fed. Reg. 51,914 (1980).
132. *Id.* at 51,917.

ment requires overriding policy judgments about which communications uses will be most in the public interest as well as nitty-gritty determinations about how best to allocate limited spectrum space.

Under the DBS application rules, applicants may request specific frequencies and orbital positions,[133] although assignments, of course, will not be made until completion of RARC-83. While each applicant's preferences will be taken into account in making assignments, the Commission stated that it may, "in acting on a particular application, restrict the number of channels assigned to any applicant, limit or modify the area to be served, or impose any other conditions it deems necessary."[134] Furthermore, under the application rules for DBS, "[t]he Commission shall generally consider all frequencies and orbital positions to be of equal value, and conflicting requests for frequencies and orbital positions will not necessarily give rise to comparative hearing rights as long as unassigned frequencies and orbital slots remain."[135]

The Commission, in its interim rulemaking for DBS, did not address the issue of the procedure to be used in assigning frequencies among competing applicants when qualified applicants exceed available spectrum space. The overall availability of spectrum space depends, of course, on the outcome of RARC-83 and is therefore unknown at this time. The FCC, however, has not gone beyond assigning priority to those nine applicants whose proposals were accepted for processing during the interim period.[136]

The Commission's staff, however, has proposed several methods for choosing among competing applicants, which the staff asserts would be more efficient than the current system of oral evidentiary hearings.[137] The staff concluded that the current system, involving lengthy adversarial hearings among

133. 47 Fed. Reg. 31575 (1982) (to be codified at 47 C.F.R. § 100.13(b)).

134. Interim Order, 47 Fed. Reg. at 31,572.

135. 47 Fed. Reg. 31575 (1982) (to be codified at 47 C.F.R. § 100.13(b)).

136. See note 37, *supra*.

137. Where mutually exclusive license applications occur the Commission must choose from among competing applicants pursuant to section 309(e) of the Communications Act of 1934. "In the past the Commission has used comparative hearings to choose among the applicants." OPP STAFF REPORT ON DBS, *supra* note 25, at 35. Comparative evidentiary hearings are currently used to choose among applicants for MDS systems. The staff estimated that the average cost of such hearings is $5,400 for the Commission and $50,000 in legal fees for each applicant and that the average length of the process is three years. *Id.* at 40.

competing applicants for limited spectrum space, would be an unduly expensive and cumbersome process for facilitating the most efficient use of the spectrum assigned to DBS operations.[138] Furthermore, the staff concluded that the Commission's criteria for selecting among competing applicants are often arbitrary and subjective and often reflect FCC preferences unrelated to what the public wants.[139] Thus, the staff recommended use of paper record proceedings, lotteries or auctions as superior methods of choosing among DBS applicants with essentially identical qualifications.[140]

Although the staff's proposals are certainly in accord with the free market orientation of the Commission's interim regulatory structure for DBS, the courts have generally held that the Communications Act requires comparative hearings where qualified applicants exceed available spectrum space and where there are substantial and material issues of fact that will affect the choice among potential licensees.[141] In addition, the FCC has recently declined to institute a lottery system for choosing among identically qualified applicants for initial telecommunications licensees.[142] This determination, however, was motivated by Congressional constraints on conducting a pure lottery proceeding. The statute in question, section 309(i),[143] only gave the Commission discretion to institute lotteries with substantial preference rankings. For instance the statute gave an advantage in the lottery to, among others, minority applicants and applicants proposing unusual formats.

C. Regulatory Background

The policy of imposing minimal regulatory constraints on

138. *Id.*

139. *Id.* at 40. "[C]omparative hearings may frequently result in an arbitrary choice among applicants. In some cases, the applicants offer such similar services that the Commission must choose among them on the basis of differences that have little effect on service to consumers. Applicants may propose services because they believe the Commission looks favorably upon them, whether consumers want them or not. In other cases, the services offered may be so different that no meaningful basis of comparison can be found."

140. *Id.* at 41.

141. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (1949).

142. Amendment of Part 1 of the Commission's Rules, 89 F.C.C.2d 257 (1982). *But see* second Notice of Proposed Rulemaking under revised legislation, 47 Fed. Reg. 45046 (1982).

143. 47 U.S.C. § 309(i) (Supp. 1982).

DBS is based, in large part, upon the Commission's determination that DBS will face stiff competition from other new communications technologies offering similar services. In this regard the FCC based its analysis on a staff report prepared by its Office of Plans and Policy,[144] which recommended that the Commission set no standards in the areas of technical compatibility, signal quality, the mode of ownership of receiving equipment, program content, prices, services offered, control of multiple channels or cross-ownership with other media.[145] These recommendations result from four related conclusions of the Commission's staff that: (1) DBS will face substantial competition from cable, subscription television (STV), multipoint distribution service (MDS), video cassettes and video discs;[146] (2) the more competition DBS faces the more it will be constrained by market pressures to offer services the public wants;[147] (3) the more competition DBS faces the more it will, by necessity, cater to the interests of specialized audiences, thus providing greater diversity of programming;[148] (4) the more competition DBS faces the smaller its overall revenues and marginal profits will be, and consequently, the more burdensome would be compliance with regulations imposed by the Commission.[149]

The Commission has adopted this approach, at least temporarily, while reserving judgment on whether the market for DBS will develop as its staff has predicted. The FCC views the provision of a developmental period without regulatory con-

144. OPP STAFF REPORT ON DBS, *supra* note 25.

145. *Id.* at 87.

146. *Id.* at 31-32: "The competing sources of home video programming have shown rapid recent expansion, and are expected to continue to expand. While great demand appears to exist for services DBS will provide, several alternative ways of satisfying it appear certain to be available. . . . Given the intense competition likely, even if there were only a single DBS operator, he would have little if any market power."

147. *Id.* at 88. "[D]etailed rules will be unnecessary and even counterproductive in a market where competitors or potential competitors constrain system operators' behavior. The threat of losing customers to competitors who provide a preferred service will cause entrepreneurs to attempt to meet consumers' preferences as closely as possible and at the lowest possible price."

148. *Id.* at 15. "Where the number of channels is larger, broadcasters may do better to provide programming that appeals to the specialized tastes of some smaller segment of the audience than to provide more middle-of-the-road programming and divide the audience for that programming into smaller and smaller shares."

149. *Id.* at 88. "Imposing a minimum of technical and market restrictions on DBS appears desirable in part because DBS seems highly risky. Major additional burdens imposed by a regulatory agency might severely affect investors' estimates of the service's profitability and might reduce the probability that it would be initiated at all."

straints as an opportunity to determine whether, in fact, DBS will face a competitive market and whether that market will result in DBS operations that are in accord with the public interest. The FCC directly acknowledged this in its interim rulemaking for DBS, stating that "[a]n important piece of information to be gained is whether, in fact, a DBS system will operate in a manner the Commission considers desirable without extensive regulation."[150]

Although it did not explicitly do so, the Commission might well have considered the inherent problems of introducing a DBS system into a highly developed country, such as the United States, which already possesses an extensive and costly terrestrial distribution network.

One commentator stated that:

> [f]or the developed countries, the case for the direct broadcast satellite has never seemed particularly strong. The developed nations already have extensive terrestrial facilities for television broadcasting; and for them, a system that uses a satellite to broadcast directly to home receiving sets may not make economic sense.[151]

In many respects DBS systems may have greater economic viability, at least initially, for the less developed countries of the world that have not yet developed elaborate terrestrial microwave transmission systems and for nations characterized by the location of significant percentages of population in remote regions. It has been suggested that "until a reliable economic analysis balancing the cost of the necessary realignment against the benefits of a direct broadcast network has been made, countries already possessing extensive television distribution networks are not likely to make a rapid transition to direct broadcasting."[152] Nonetheless, the Commission has decided to encourage the rapid development of DBS in an environment of uncertain receptivity by the public. The conventional terrestrial broadcasting system already in place in the United States may have a fundamentally inhibiting and long lasting effect on the development of DBS. The heavy competition DBS will face from entrenched conventional broadcasters

150. Interim Notice, 86 F.C.C.2d at 751.

151. A. CHAYES & P. LASKIN, DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS. A REPORT OF THE PANEL ON INTERNATIONAL TELECOMMUNICATIONS POLICY 6 (1975).

152. D. SMITH, COMMUNICATION VIA SATELLITE, A VISION IN RETROSPECT 214 (1976).

may in itself be a compelling argument for maximum flexibility in the regulatory scheme adopted for DBS.

VI
Conclusion

The FCC has often been criticized as adverse to new communications technologies.[153] The accommodating nature of the Commission's interim regulations for DBS would seem to belie that criticism. The Commission is determined, at least initially, to encourage the expeditious development of DBS. This was demonstrated in the interim rulemaking for DBS in three major ways. First, the FCC discounted the potential impact of DBS on the local broadcasting system[154] and upon the current users of the broadcasting spectrum being set aside for DBS operations, many of whom may be displaced by the new technology.[155] This reflects the Commission's view that some disruption in existing communications services is justified in the development of new communications technologies that have been determined to be in the overall public interest. Second, the FCC left the resolution of as many matters as possible to the interaction of marketplace forces. Among these were the most basic decisions of what services would be offered and under which conventional regulatory structure DBS operations would fall.[156] This is illustrative of the Commission's view that DBS will face a saturated market, encountering stiff competition from other new communications technologies. As a result, the Commission has concluded that DBS operators will be forced by market pressures to function in the public interest. In addition, this reflects the FCC's concern that the imposition of additional regulatory costs in a market characterized by low marginal profits and high risk might deter some entrepreneurs from developing DBS. Finally, the FCC will allow the development of DBS systems to proceed without significant regulation despite the environment of substantial uncertainty as to the eventual market impact on DBS. This reflects the Commission's desire to develop a base of practical

153. *See, e.g., Direct Broadcast to Home Satellites - Boon or Bane to Broadcasting, Cable and the Public: A Panel Discussion*, *supra* note 26, at 149-157 (comments of Dr. Nina W. Cornell).

154. See text accompanying notes 81-104, *supra*.

155. See text accompanying notes 51-63, *supra*.

156. See text accompanying notes 115-143, *supra*.

experience with DBS prior to making permanent regulatory decisions.

Much of the Commission's analysis is sound. In many respects it is impossible to know just what to expect from the new and untried DBS technology. Further, it seems clear that the Commission should not impede the development of what is conceded to be a beneficial new technology merely because the ultimate impact of DBS is not known and is largely unpredictable. The Commission should, however, take the opportunity to integrate access and consumer responsiveness requirements into DBS systems at this early stage. Marketplace forces alone are not adequate to insure that DBS will operate in the overall public interest. The Commission's approach runs the risk of creating a mediocre new communications system that is unresponsive to many segments of the viewing public.